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 BASK TECHNOLOGY, INC.

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

D'ANGELO FERRERI, on behalf of  
 himself and all others similarly  
 situated,

Plaintiff,

vs.

BASK TECHNOLOGY, INC.  
 (formerly named iTOK, INC.), a  
 corporation; and FIELD NATION,  
 LLC, a limited liability company,]

Defendants.

Case No. 15cv1899-CAB-MDD

**MEMORANDUM IN SUPPORT OF  
 JOINT MOTION FOR FLSA  
 COLLECTIVE ACTION  
 SETTLEMENT APPROVAL,  
 FINAL CERTIFICATION, AND  
 AUTHORIZATION TO  
 EFFECTUATE SETTLEMENT**

Date: January 23, 2017  
 Courtroom: 4C  
 The Hon. Cathy Ann Bencivengo

Complaint Filed: August 28, 2015  
 Trial Date: None Set

PER CHAMBERS RULES, NO ORAL

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ARGUMENT UNLESS  
SEPARATELY ORDERED BY THE  
COURT.

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## **I. INTRODUCTION**

This is a conditionally certified FLSA collective action regarding the alleged misclassification of employees as independent contractors. Defendant Bask Technology, Inc. — formerly named iTOK, Inc. (“Bask”) provides remote technical support for homes and businesses. Plaintiff D’Angelo Ferreri alleges that all Remote Technical Advisors (RTAs) for Bask through Field Nation were misclassified as independent contractors rather than employees. As a result, he alleges that RTAs were not paid for six hours of training time, some RTAs were not paid minimum wages, and if RTAs worked over 40 hours during a workweek, were not paid overtime wages. Bask denies any wrongdoing. The Court conditionally certified the matter under the FLSA.

Thirty-four individuals joined. (“Opt-In Members”) (Ferreri and the Opt-In Members are collectively referred to as “Settlement Members”). To avoid protracted litigation and expense — particularly in light of the number of Opt-In Members and amount of potential damages at-issue — the parties engaged in informal discovery to calculate potential damages if the Settlement Members had been misclassified, and then participated in a Settlement Conference with Magistrate Judge Dembin where a settlement was reached. The proposed settlement resolves FLSA claims only and through negotiation covers a three-year, rather than two-year, statute of limitations period. Under the agreement, Settlement Members receive approximately 100% of their estimated potential unpaid wages, approximately 50% of their estimated potential liquidated damages, and Ferreri’s counsel receives, if awarded, \$9,500 in fees and \$1,352.82 in costs.

Upon approval of this revised proposed settlement, Ferreri will dismiss all remaining claims, which concern unpaid wages under California law. Ferreri’s counsel formally represents Ferreri and the two other Settlement Members who have California claims against Bask. Those members have entered into separate settlement agreements with Bask to resolve their California claims only. The

1 compensation provided in those separate agreements do not duplicate or overlap  
2 the compensation provided in the proposed collective agreement.

3 On November 21, 2016, the Court denied the parties' previous motion for  
4 approval, expressing various concerns about the proposed terms. (Doc. 71). The  
5 parties recognize that several areas of concern resulted from their failure to  
6 properly explain the proposed settlement. The parties nonetheless have taken the  
7 Court's concerns to heart and have revised the proposed agreement accordingly.  
8 (Declaration of Alisa A. Martin ("Martin Decl."), Ex. A, revised agreement).

9 **Concern 1: Scope of Settlement and Release**

10 As mentioned above, three Settlement Members have California claims  
11 against Bask. The previous settlement sought to resolve the California claims. The  
12 Court however stated that it would not approve a settlement that resolved and  
13 released anything beyond FLSA claims and that any other claims could be  
14 addressed through individual settlements. As such, the revised settlement addresses  
15 and releases FLSA claims only. The three Settlement Members with California  
16 claims against Bask have resolved those claims through separate individual  
17 settlements.

18 **Concern 2: Uncertainty About Rule 23 Class Claims and PAGA Claims**

19 The previously settlement did not specify whether all non-FLSA claims will  
20 be dismissed upon approval of the proposed settlement. The revised agreement  
21 specifies that all other claims will be dismissed with prejudice because the three  
22 Settlement Members with California claims have entered into separate settlement  
23 agreements with Bask to resolve those claims as well.

24 **Concern 3: Identity of the Opt-In Members**

25 The previous motion only provided a declaration identifying the Opt-In  
26 Members and the names listed in the declaration did not match the list of  
27 individuals who would receive compensation under the previous settlement. The  
28 Parties filed the executed Consent to Join Forms concurrently with this motion and

1 have explained the discrepancies between the lists in the supporting declaration of  
2 Bryan Benard and below in Section II(C).

3 **Concern 4: Attorney's Fee Request**

4 The Court found the previous \$75,000 fee request to be unreasonable and  
5 indicated that the fees should not exceed 25% of the total compensation paid under  
6 the settlement. Ferreri's counsel believes that a lodestar method, as opposed to a  
7 percentage-of-award method, should be used to assess the reasonableness of the  
8 requested fees because the fees were negotiated separate from the collective  
9 compensation and because neither the previous settlement, nor the revised  
10 settlement, involves a common fund. Nonetheless, Ferreri's counsel reduces their  
11 fee request to \$9,500, which amounts to less than 25% of total compensation paid  
12 under this settlement to resolve FLSA claims.

13 **Concern 5: Incentive Fee Request**

14 The Court found the previous \$2,000 incentive award request to be  
15 unreasonable. Ferreri no longer requests an incentive award.

16 Based on these revisions, the parties respectfully request the Court to  
17 approve the settlement and request for fees and costs.

18 **II. BACKGROUND**

19 **A. Ferreri's Alleged Claims Against Bask**

20 Bask provided remote technical support for homes and businesses. The  
21 individuals who provided this support to Bask's customers were called RTAs.  
22 Bask obtained RTAs through Field Nation, a third party company. Ferreri alleged  
23 that when RTAs worked for Bask, they had to work set shifts where they would  
24 have to be logged into their computers and ready to respond to Bask customers'  
25 calls for technical support, referred to as "tickets." Bask paid Field Nation \$18 per  
26 completed ticket, and then Field Nation paid RTAs on a per ticket basis after  
27 deducting certain fees from the amount received from Bask. Bask and Field Nation  
28 treated RTAs as independent contractors and paid on a 1099 basis. (Martin Decl.,

¶ 2).

Ferreri alleged that the RTAs were misclassified as independent contractors instead of hourly employees and that the per ticket compensation structure resulted in the nonpayment of minimum wages and/or overtime wages. Ferreri further alleged that RTAs were entitled to compensation for the 6-hour training session that Bask required them to attend. To that end, Ferreri asserted FLSA claims and various claims against Bask under California's labor laws. Bask maintains that the individuals were properly classified as independent contractors rather than employees and denies that it ever employed the Settlement Members. (Martin Decl., ¶ 3).

Ferreri originally named Field Nation as a defendant, alleging that it operated as a joint-employer. Ferreri later determined through discovery that Field Nation operated more like Bask's payroll company and improperly deducted fees from his paycheck. Ferreri and Field Nation entered into a confidential settlement agreement in which Ferreri received \$6,000 in exchange for a release of claims against Field Nation and the dismissal of Field Nation from this action with prejudice. (Martin Decl., ¶ 4). On April 7, 2016, the Court determined that the settlement between Ferreri and Field Nation was in good faith within the meaning of California Code of Civil Procedure sections 877 and 877.6. (Doc. No. 46).

### **B. Conditional Collective Certification**

The operative complaint asserts claims on behalf of all RTAs that worked for Bask under FLSA and California law. Ferreri's counsel moved to certify a collective action on behalf of all RTAs, regardless of whether the RTAs worked through Field Nation or some other third party entity. On April 8, 2016, the Court conditionally certified a FLSA collective, but limited the collective to those who worked through Field Nation:

All persons who contracted with Field Nation, LLC, to perform work for Bask Technology, Inc. (formerly named iTOK, Inc.), or Bask/iTOK's customers, as a



Technical Advisor, Technical Support Representative, Support Technician or in any other similar position that provided remote technical services and were classified as an independent contractor within three years preceding the date of their decision to opt-in to this action. (Doc. No. 47)

The Court's limitation did not significantly impact the overall collective size because the majority of RTAs that worked for Bask during the relevant timeframe as independent contractors came through Field Nation. Plus, some of the other third party entities that provided RTAs to Bask only had a few RTAs, raising numerosity issues. (Martin Decl., ¶ 5).

At the Court's direction, notice and consent to join forms were mailed to 152 individuals. Thirty-four individuals consented to join the collective action. The names of these individuals are:

**Opt-In Names**

1. Aaron DelBalzo
2. Adam Patterson
3. Ahamadu Massard
4. Bernard Honigfont
5. Blake Clausnitzer
6. Brandon Lineberry
7. William Kirsling (AKA Cody Kirsling)
8. Colby Stayton
9. Colten Wills
10. Daryl Mason
11. Dawn Wooten
12. George Shipe
13. Hardwick Powell
14. Jacob Adams
15. James Keenan Lake (AKA Nikki Raeburn)
16. Jason Kube
17. Jordan Moline
18. Julian Wilson
19. Lynne Stratford
20. Michael Jackson

**Opt-In Names**

21. Michael Marceau
22. Michael Vandamme
23. Nathan Tyree
24. Paul Simo
25. Rachel Grimm
26. Rachel Peterson
27. Ronald Toney
28. Shannel Thomas
29. Solita Green
30. Stanley Komarniski
31. William Keith Williams
32. Yvonne Henderson
33. John Thies
34. Tim Ryan (Martin Decl., ¶ 6).

**C. Discovery, Settlement Discussions, And Settlement Conference**

After certification, the parties met and conferred over discovery issues including (1) the size of the potential collective members that fell outside of conditionally certified group (i.e. RTAs who worked for Bask through entities other than Field Nation) and (2) the size of the potential California class. As for the former issue, the majority of RTAs that worked for Bask as independent contractors during the relevant timeframe came through Field Nation. Plus, some of the other third party entities only provided a few RTAs to Bask, raising numerosity issues. As for the former issue, the potential California class contained only a few members, again raising numerosity issues. (Martin Decl., ¶ 7).

Taking all of that into consideration and to avoid expensive and protracted litigation, the Parties engaged in informal discovery and began arms' length negotiations and discussions. These negotiations proved fruitful. After several conference calls, and for settlement purposes, the Parties discussed a framework

1 and method for calculating potential unpaid wages and penalties for Ferreri and  
 2 each Opt-In Member and the amount of potential unpaid wages and penalties  
 3 potentially owed to Ferreri and each Opt-In if they could prevail on showing that  
 4 they were misclassified. This framework and method made individualized  
 5 calculations for each Opt-In Member and Ferreri based on their own potential  
 6 damages, which resulted in variations of potential recovery for each of them, and  
 7 consisted of the following (Martin decl., ¶ 8):

- 8 • **Unpaid Training Hours:** All Opt-In Members were potentially  
 9 entitled to compensation for six hours of unpaid training. Based on  
 10 the actual logs, some Opt-In Members were only potentially entitled  
 11 to damages for this training time and not for potential minimum  
 12 wage or overtime.
- 13 • **Unpaid Minimum Wage:** This amount, if any, varied for each Opt-  
 14 In Member, depending upon the number of hours each Opt-In  
 15 Member was actually logged into Bask's system in a given week, the  
 16 number of tickets the Opt-In Member processed during that week,  
 17 and the amount of compensation paid to the Opt-In Member during  
 18 the relevant invoice period. These amounts varied individually, as  
 19 some Opt-In Members were never even potentially not paid  
 20 minimum wage and as a result were not allocated any amounts for  
 21 this.
- 22 • **Unpaid Overtime Wages:** This amount, if any, varied for each Opt-  
 23 In Member, depending upon whether the Opt-In Members logged  
 24 over 40 hours in Bask's system during a given week. These amounts  
 25 varied individually, as some Opt-In Members never logged more  
 26 than 40 hours in a given week. (*Id.*)

27 In light of the above discussions and individualized calculations, the Parties  
 28 believed that a potential settlement could include (1) compensating Ferreri and

1 each Opt-In Member based on their estimated unpaid wages as calculated above,  
 2 and (2) compensating Ferreri for incurred costs. In order to get the parties to  
 3 settlement, they agreed to participate in a Settlement Conference with Magistrate  
 4 Judge Dembin to help come to an agreement on these issues, help determine  
 5 payments to Ferreri and Opt-In Members, and help determine the amount of  
 6 penalties, incentive award and attorney's fees, if any, to be paid under a potential  
 7 settlement. (Martin Decl., ¶ 9).

8 At the Settlement Conference, the parties exchanged specific individualized  
 9 calculations of potential damages and penalties to each other and to Judge  
 10 Dembin. Discussions were held on the proper statute of limitations to apply,  
 11 whether penalties or liquidated damages were appropriate to consider, the various  
 12 risk factors for both parties, and related issues. The Parties came to agreement on  
 13 the specific individualized calculations to be used and agreed to settlement  
 14 payments with the assistance and recommendation of Judge Dembin.<sup>1</sup> Also with  
 15 Judge Dembin's assistance, the Parties reached an agreement on attorney's fees.  
 16 (Martin Decl., ¶10).

### 17 **III. KEY SETTLEMENT TERMS**

#### 18 **A. Payments To Settlement Members**

##### 19 **1. Summary**

20 The Settlement Members are receiving compensation based on a 3-year  
 21 statute of limitations, as opposed to just a 2-year statute of limitations. Each  
 22 Settlement Member will receive approximately 100% of their alleged estimated  
 23 potential unpaid training hours, 100% of alleged potential estimated unpaid  
 24 minimum wages under the applicable federal minimum wage rate (if their hourly  
 25 compensation rate was less than minimum wage during a workweek), 100% of

26 <sup>1</sup> The Parties also agreed to compensate all the three California Opt-Ins on their  
 27 California claims as well. The Parties originally tried to do this in their previous  
 28 settlement agreement, which the Court rejected, and are now doing this under  
 separate individual settlement agreements.

their alleged estimated potential unpaid overtime (if they worked over 40 hours during a workweek), and approximately 50% of potential liquidated damages for unpaid minimum wages under 29 U.S. Code § 216. (Martin Decl., ¶ 11). Payment amounts are broken down as follows, as provided in the agreement itself:

Opt-In Member Name (3 Year Statute of Limitations)	Alleged Unpaid Training Hours	Potential Unpaid Minimum Wages	Potential Unpaid Overtime	50% Liquidated Damages	Settlement Amount
D'Angelo Ferreri	\$43.50	\$91.75	\$268.78	\$202.01	\$606.04
Aaron DelBalzo	\$43.50	\$0	\$0	\$21.75	\$65.25
Adam Patterson	\$43.50	\$0	\$88.25	\$65.88	\$197.63
Ahamadu Massard	\$43.50	\$144.97	\$117.10	\$152.78	\$458.35
Bernard Honigfont	\$43.50	\$27.90	\$804.66	\$438.03	\$1,314.09
Blake Clausnitzer	\$43.50	\$0	\$68.03	\$55.77	\$167.30
Brandon Lineberry	\$43.50	\$257.26	\$28.87	\$164.81	\$494.44
William Kirsling (AKA Cody Kirsling)	\$43.50	\$0	\$418.83	\$231.16	\$693.49
Colby Stayton	\$43.50	\$462.41	\$2.72	\$254.32	\$762.95
Colten Wills	\$43.50	\$0	\$269.53	\$156.52	\$469.55
Daryl Mason	\$43.50	\$141.89	\$222.34	\$203.86	\$611.59
Dawn Wooten	\$43.50	\$38.37	\$89.09	\$85.48	\$256.44
George Shipe	\$43.50	\$266.90	\$41.67	\$176.03	\$528.10
Hardwick Powell	\$43.50	\$0	\$0	\$21.75	\$65.25
Jacob Adams	\$43.50	\$73.16	\$27.29	\$71.97	\$215.92
James Keenan Lake (AKA Nikki Raeburn)	\$43.50	\$19.23	\$75.03	\$68.88	\$206.64
Jason Kube	\$43.50	\$279.56	\$0	\$161.53	\$484.59
Jordan Moline	\$43.50	\$90.11	\$0	\$66.80	\$200.41
Julian Wilson	\$43.50	\$0	\$0	\$21.75	\$65.25
Lynne Stratford	\$43.50	\$6,368.31	\$1,610.71	\$4,011.26	\$12,033.78
Michael Jackson	\$43.50	\$413.05	\$375.61	\$416.08	\$1,248.24
Michael Marceau	\$43.50	\$0	\$0	\$21.75	\$65.25
Michael Vandamme	\$43.50	\$313.86	\$71.39	\$214.37	\$643.12
Nathan Tyree	\$43.50	\$0	\$39.46	\$41.48	\$124.44
Paul Simo	\$43.50	\$0	\$123.59	\$83.55	\$250.64
Rachel Grimm	\$43.50	\$447.14	\$486.59	\$488.61	\$1,465.84

<b>Opt-In Member Name (3 Year Statute of Limitations)</b>	<b>Alleged Unpaid Training Hours</b>	<b>Potential Unpaid Minimum Wages</b>	<b>Potential Unpaid Overtime</b>	<b>50% Liquidated Damages</b>	<b>Settlement Amount</b>
Rachel Peterson (misspelled as Patterson)	\$43.50	\$9.52	\$765.78	\$409.40	\$1,228.20
Ronald Toney (misspelled as Terry)	\$43.50	\$0	\$0	\$21.75	\$65.25
Shannel Thomas	\$43.50	\$0	\$168.43	\$105.97	\$317.90
Solita Green	\$43.50	\$0	\$49.15	\$46.33	\$138.98
Stanley Komarniski	\$43.50	\$34.28	\$1,010.60	\$544.18	\$1,632.56
William Keith Williams	\$43.50	\$0	\$63.02	\$53.26	\$159.78
Yvonne Henderson	\$43.50	\$0	\$0	\$21.75	\$65.25
John Thies	\$43.50	\$0	\$55.93	\$49.71	\$149.14
Tim Ryan	\$43.50	\$2,477.89	\$1,081.01	\$1,801.20	\$5,403.60
<b>Total</b>					\$32,855.27

The Court noted in its November 21, 2016 Order that the actual Consents to Join had not been filed with the Court and also noted a few inconsistencies in the names listed in the Declaration of Ms. David and the charts the parties included. Concurrently with the filing of this Joint Motion for Approval of Settlement, the parties are filing 34 consent forms (alphabetical by first name), which create the Opt-In Members in addition to the Ferreri. The settlement payment chart above and attached to the proposed settlement agreement begins with Ferreri the Ferreri and then includes the 34 Opt-In Members. (Declaration of Bryan Benard (“Benard Decl.”), ¶5).

The inconsistencies have been identified and remedied. First, the prior chart listed “Cody” Kirsling, whose given name is William Kirsling (as signed on the consent form). They are the same person. The settlement chart now lists William Kirsling (AKA Cody Kirsling). Second, Ms. David listed the names Rachel Patterson and Rachel Peterson. This was an oversight. There is no Rachel Patterson involved in this matter. Rachel Peterson is the proper party and has

signed a consent, which is being filed. Third, Ms. David had listed “Nikki Raeburn” on her list. At the relevant time, Ms. Raeburn was known as James Keenan Lake and therefore, has been listed in the Settlement Chart as James Keenan Lake and the consent form has been filed as James Keenan Lake. Finally, there was a typo in the Settlement Chart listing a Ronald “Terry” where Ms. David listed Ronald “Toney.” Toney is the proper spelling and this discrepancy has been corrected and Mr. Toney has filed a consent. This should resolve discrepancies between the list of individuals who submitted Consent to Join forms and the list of individuals that will receive compensation under proposed settlement. (Benard Decl., ¶6-9).

## **2. Calculations**

### **a) Alleged Unpaid Training Hours**

All Settlement Members attended 6 hours of training. To determine the alleged unpaid training wages, the Parties multiplied six hours by the applicable minimum wage rate. (Martin Decl., ¶ 12).

<b>6 Hours</b>	<b>X</b>	<b>\$7.25</b>	<b>=</b>	<b>\$43.50</b>
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### **b) Alleged Unpaid Minimum Wage**

The Parties reviewed data showing the number of hours each Settlement Member was logged onto Bask’s system per day. The Parties also reviewed invoices showing the amount actually paid to each Settlement Member. To determine if a Settlement Member was paid less than minimum wage during a workweek, the Parties divided the amount actually paid during the workweek by the number of hours logged into Bask’s system to determine the potential hourly rate for that week. (Martin Decl., ¶ 13).

$$\text{Amount Paid} \div \text{\# Hours Worked} = \text{Hourly Rate}$$

If hourly rate was \$7.25 or above, then minimum wages were not even conceivably owed for that week. But if the hourly rate was below \$7.25, then minimum wages were potentially owed for that week. The Parties calculated the amount of minimum wages potentially owed by multiplying the number of hours worked that week by \$7.25. Because Settlement Members already received some compensation during weeks in which they were paid below minimum wage, the Parties calculated the amount of potential unpaid minimum wages by subtracting the amount of wages paid from the amount of potential wages owed. (Martin Decl., ¶ 13).

$$\text{Hours Worked} \times \$7.25 = \text{Amount Owed}$$

$$\text{Amount Owed} - \text{Amount Paid} = \text{Unpaid Minimum Wages}$$

**c) Alleged Unpaid Overtime**

To calculate unpaid overtime, the Parties looked at the number of hours Settlement Members were logged into Bask's system during a workweek. If the hours exceeded 40, then the parties multiplied the number of hours exceeding 40 by \$3.63 (\$7.25 x 0.5) to determine the amount of potential unpaid overtime for that workweek. The parties used 0.5 instead of 1.5 for the overtime rate since potential straight time was already calculated in subsection 2 above. (Martin Decl., ¶ 14).

$$\text{\# Hours} > 40 \times \$3.63 = \text{Unpaid Overtime}$$



**d) Liquidated Damages**

Under 29 U.S. Code § 216(b), liquidated damages is an amount equal to unpaid minimum wages and overtime. The proposed settlement compensates Settlement Members approximately 50% of potential liquidated damages, which is approximately 50% of the estimated potential unpaid training, minimum and overtime wages. (Martin Decl., ¶ 15). Given the risks involved and the potential for not establishing liability at all, this was a compromise calculation.

<b>Total Unpaid Wages</b>	<b>x</b>	<b>50%</b>	<b>=</b>	<b>Liquid Damages Under Settlement</b>
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**3. Payment Classification**

Bask maintains that the individuals were properly classified as independent contractors rather than employees, denies that it ever employed the Settlement members, and no longer has any service relationship with these individuals as RTAs through Field Nation. The Individual Settlement Payments will be paid to the Settlement Members for services rendered as independent contractors, for which an IRS Form 1099 will be issued, as Bask denies that the Settlement Members were ever employed by Bask. Settlement Members individually shall be responsible for payment of any taxes attributable to their own Individual Settlement Payment. (Martin Decl., Ex. A, ¶ 2(A)).

**B. Release and Covenant Not to Sue**

In exchange for the settlement payment, the Settlement Agreement requires Opt-In Members to agree to a specific release, which extends to claims under FLSA only. The specific release reads as follows:

**Release.** Conditioned upon Court approval of the settlement and dismissal of the case with prejudice, Plaintiff and Opt-In Members, individually and in their

representative collective capacity, for themselves and their heirs, successors, assigns, personal representatives, executors, legal representatives, spouses, agents, insurers, and attorneys, do hereby release and discharge Defendant and its current and former parents, subsidiaries, affiliates, successors, predecessors, assigns, officers, directors, shareholders, associates, employees, agents, insurers, attorneys, and representatives (collectively, “the Released Parties”), of and from any and all claims asserted, or which could have been asserted, in the Action under FLSA, including all rights, demands, charges, complaints, causes of action, obligations, or liability of any and every kind (including any and all claims or demands for attorneys’ fees and costs), whether known or unknown, whether anticipated or unanticipated, that arose or accrued arose or accrued at any time during the period from June 1, 2012, through the date of this Agreement, for any type of wages, overtime, hours worked, misclassification as independent contractors, premium pay, damages, statutory damages, liquidated damages, unpaid costs, statutory penalties, civil penalties, punitive damages, interest, attorneys’ fees, litigation costs, restitution, or equitable relief (“Released Claims”).

**Exclusion.** Any and all claims under the California law, including California Business and Professions Code, California Labor Code, including PAGA, are excluded from the Released Claims.

**Covenant Not to Sue.** Plaintiff and Opt-In Members further covenant not to sue Defendant or the Released Parties for any of the Released Claims. (Martin Decl., Ex. A, ¶ 3).

### **C. Dismissal of All Remaining Claims**

Upon approval of this revised proposed settlement, Ferreri will request the Court to dismiss all remaining claims. These claims concern unpaid wages under California law. Ferreri’s counsel formally represents the three Settlement Members with California claims against Bask. Those members have entered into separate settlement agreements with Bask to resolve their California claims only. The compensation provided in those separate agreements do not duplicate or overlap the compensation provided in the proposed collective agreement. (Martin Decl., ¶ 1(K)).

### **D. Procedures For Informing Opt-In Members About Settlement**

### and Distributing Settlement Checks

Within 14 days from the date the Court approves the settlement and dismisses with case with prejudice, Bask will mail out to each Settlement Member a notice letter with an enclosed settlement check. Bask will concurrently pay to Ferreri's counsel all Court awarded fees and costs. Settlement Members will have at least 180 days to negotiate their checks. If any mailings are returned or otherwise undeliverable, the parties will work together to try to locate any Settlement Members, if necessary. If the parties are unsuccessful in delivering a check to a Settlement Member, then Bask will hold onto the check for at least 180 days from the date of issuance. If a Settlement Member whose check was undeliverable fails to claim the check within 180 days or if a Settlement Member fails to cash a check within 180 days from the date of issuance, Bask will tender the unclaimed amount to the appropriate state's office, department or division for unclaimed property. (Martin Decl., Ex. A, ¶ 5).

## IV. APPROVAL OF THE PROPOSED SETTLEMENT IS WARRANTED

### A. Standard

The FLSA protects workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). An employee's right to fair payment "cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Id.* at 740 (internal quotation marks omitted). So FLSA collective action settlements require court approval. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982).

The Ninth Circuit has not established the criteria that a district court must consider in determining whether an FLSA settlement warrants approval. Most courts, however, first consider whether the named plaintiffs are "similarly situated" to the putative class members within the meaning of 29 U.S.C. § 216(b) (providing

1 that an aggrieved employee may bring a collective action under the FLSA on  
 2 behalf of himself and “other employees similarly situated”). If the collective action  
 3 members are similarly situated, most courts then evaluate the settlement under the  
 4 standard established by the Eleventh Circuit, which requires the settlement to  
 5 constitute “a fair and reasonable resolution of a bona fide dispute over FLSA  
 6 provisions.” *Lynn’s Food Stores*, 679 F.2d at 1355. “If a settlement in an employee  
 7 FLSA suit does reflect a reasonable compromise over issues...that are actually in  
 8 dispute,” the district court may “approve the settlement in order to promote the  
 9 policy of encouraging settlement of litigation.” *Lynn’s Food Stores*, 679 F.2d at  
 10 1354. Where, as here, the litigation arises from a private enforcement action under  
 11 Section 216(b) of the FLSA, 29 U.S.C. § 216(b), the standard for approval is  
 12 straightforward: “if the settlement reflects ‘a fair and reasonable resolution of a  
 13 bona fide dispute,’ the court may approve it.” *Deane v. Fastenal Co.*, 2013 U.S.  
 14 Dist. LEXIS 163330, \*7 (N.D. Cal. Nov. 14, 2013) (quoting *Lynn’s Food Stores*,  
 15 679 F.2d at 1354-55). The parties’ proposed settlement should be approved as it  
 16 reflects a reasonable compromise of the parties’ claims and defenses, considering  
 17 all of the risks and the limited assets available to satisfy a settlement or judgment.

#### 18 **B. Settlement Members Are Similarly Situated**

19 The court has previously determined that the collective members are  
 20 similarly situated and conditionally certified the collective action. (Doc. 47 at 8).  
 21 Nothing has changed about the settlement group that would undermine the Court’s  
 22 previous ruling. (See Doc. No. 47 at 6). The proposed settlement is on behalf of the  
 23 conditionally certified collective members who opted-in. Thus, the Court should  
 24 finally certify this collective action for settlement purposes only. *Otey v.*  
 25 *Crowdflower, Inc.*, Case No. 12-cv-05524-JST, 2015 U.S. Dist. LEXIS 86712 \*14  
 26 (N.D. Cal. July 2, 2015) (when evaluating an unopposed motion for approval of a  
 27 FLSA collective action settlement, Hon. Tigar indicated that additional  
 28 certification analysis is not necessary if the Court already conditionally certified

1 the collective action and found that the collective members are similarly situated).

### 2 **C. Bona Fide Dispute Existed**

3 The proposed settlement is a product of contested litigation. Ferreri pled  
 4 detailed factual allegations describing Bask's alleged misclassification practices.  
 5 (Doc. Nos. 1, 30, 34). Bask denied Ferreri's allegations and asserted an array of  
 6 affirmative defenses. (Doc. Nos. 4, 44, 49). Ferreri moved for conditional  
 7 certification and presented evidence to support the motion. (Doc. Nos. 32) Bask  
 8 opposed the motion with its own evidence. (Doc No. 35). After the Court granted  
 9 Ferreri's motion in part, the parties briefed a discovery dispute. (Doc. No. 48).  
 10 Soon thereafter, the parties participated in informal discovery and explored  
 11 settlement negotiations. Although the parties were able to work together to  
 12 determine the amount of potential unpaid wages if the Settlement Members were in  
 13 fact misclassified and agreed that any settlement would include the payment of this  
 14 amount, the parties disputed the applicable statutes of limitation and whether  
 15 liquidated damages and penalties were warranted, and if so, how much should be  
 16 paid in the settlement. Bask argued that the liquidated damages and penalties were  
 17 unwarranted because, among other things, Bask did not act willfully and had a  
 18 good faith belief that its actions were lawful. Ferreri however argued that  
 19 liquidated damages and penalties were warranted, justified, and thus, should be  
 20 subjected to minimal discount, if any. The parties argued their respective positions  
 21 to Hon. Dembin who assisted them with reaching the proposed settlement. (Martin  
 22 Decl., ¶ 10). Thus, the proposed settlement was the product of a *bona fide* dispute  
 23 and vigorously contested litigation.

### 24 **D. Fair and Reasonable Settlement Agreement**

25 In evaluating a proposed FLSA settlement, a district court must determine  
 26 whether the settlement reflects "a fair and reasonable resolution of a bona fide  
 27 dispute." *Lynn's Food Stores*, 679 F.2d at 1355. To determine whether a settlement  
 28 is fair and reasonable, district courts implicitly or explicitly consider the factors

1 that are used to evaluate Rule 23 class action settlements, which include:

2 the strength of the plaintiffs' case; the risk, expense,  
3 complexity, and likely duration of further litigation; the  
4 risk of maintaining class action status throughout the  
5 trial; the amount offered in settlement; the extent of  
6 discovery completed and the stage of the proceedings;  
the experience and views of counsel; the presence of a  
governmental participant; and the reaction of the class  
members to the proposed settlement. *Hanlon v. Chrysler*  
*Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

7 These factors establish that the proposed settlement is fair and reasonable.

### 8 **1. The Strength of The Case**

9 As argued in Ferreri's motion for conditional certification, Ferreri believes  
10 Bask's own documents show that they misclassified RTAs through Field Nation as  
11 independent contractors. (Doc. No. 32). Bask disagrees that it misclassified RTAs  
12 and presented evidence to the contrary. (Doc. No. 35). Although the parties are  
13 each confident in their respective positions, the parties are keenly aware of risks  
14 and costs associated with continued litigations.

### 15 **2. The Risk, Expense, Complexity, and Likely Duration**

16 Bask is not a large company and recognizes the potential financial impact  
17 protracted litigation or judgments can have on a business. Continued litigation  
18 would be extensive since misclassification claims involve a multi-factor, fact  
19 intensive analysis, which may involve expert testimony. If the parties continued  
20 litigating this case, this case would likely not be ready for trial until at least two  
21 years from now, since the parties would still have to go through, for example, the  
22 final certification/decertification process and motion for summary judgment  
23 process. Because the settlement provides the Settlement Members to receive  
24 approximately 75% of their estimated potential damages and because there is a real  
25 risk that the Settlement Members may not prevail at trial, the settlement makes  
26 sense.

### 27 **3. Continued Litigation Involves Risk of Decertification**

28 Bask maintains that if forced to continue with litigation, it will file a motion



1 to decertify the conditionally certified collective action. Ferreri believes that he  
 2 will be able to maintain certification. Nonetheless, the parties recognize that  
 3 continued litigation always carries risks for both sides.

#### 4 **4. Settlement Members Receive Fair and Appropriate** 5 **Compensation**

6 The settlement compensates the Settlement Members approximately 100%  
 7 of their estimated potential unpaid training wages, 100% of their estimated  
 8 potential minimum wages, approximately 100% of their estimated potential unpaid  
 9 overtime, and approximately 50% of their estimated potential liquidated damages  
 10 and penalties. The settlement also covers fees and costs, which does not reduce or  
 11 otherwise diminish compensation paid to the Settlement Members.

#### 12 **5. Significant, Targeted Discovery Completed**

13 This case is still in a relatively early stage of litigation. After notice of the  
 14 conditionally certified collective action was mailed, Ferreri propounded discovery  
 15 and noticed a personal most knowledgeable deposition. The parties thereafter  
 16 conducted informal discovery and obtained sufficient information to allow them to  
 17 assess potential damages for each Settlement Members. After the parties had  
 18 adequate information to determine potential damages, the parties participated in a  
 19 Court-sponsored settlement conference with Honorable Dembin and with his help,  
 20 reached the proposed settlement. (Martin Decl., ¶ 10).

#### 21 **6. Counsel's Experience and Views**

22 During this relatively brief, but highly-contested litigation, Ferreri's counsel  
 23 gained comprehensive knowledge of the facts, legal issues and risks relating to the  
 24 respective claims and defenses and acquired ample evidence on which to assess the  
 25 proposed settlement. Based on their knowledge of the facts and the applicable law,  
 26 as well as their extensive experience in representative and class litigation, Ferreri's  
 27 counsel believes the settlement is fair, reasonable, and adequate. (Martin Decl., ¶  
 28 11). "Courts give weight to counsels' opinions regarding the fairness of a

1 settlement, when it is negotiated by experienced counsel.” *Clesceri v. Beach City*  
 2 *Investigations & Protective Servs., Inc.*, 2011 U.S. Dist. LEXIS 11676, \*28-29  
 3 (C.D. Cal. Jan. 27, 2011); *In re Wash. Pub Power Supply Sys. Sec. Litig.*, 720  
 4 F.Supp. 1379, 1387 (D. Ariz. 1989) (“Counsel’s opinions warrant great weight both  
 5 because of their considerable familiarity with this litigation and because of their  
 6 extensive experience in similar actions.”). Bask’s counsel concurs that the  
 7 settlement is fair, reasonable and adequate.

#### 8 **7. No Presence of a Governmental Participant**

9 No government entity participated as a party to this case. However, Hon.  
 10 Dembin assisted the parties with reaching a settlement.

#### 11 **8. Settlement Members React Positively to the Settlement**

12 Ferreri’s counsel spoke with several Settlement Members about this  
 13 settlement. They were excited about the settlement and looking forward to  
 14 receiving money from the settlement. No one expressed anything negative about  
 15 the settlement. (Martin Decl., ¶ 16).

### 16 **V. REQUESTED FEES ARE REASONABLE**

17 The FLSA provides for such agreements to include an award of reasonable  
 18 fees. *See* 29 U.S.C. § 216(b) (“The court in such action shall, in addition to any  
 19 judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to  
 20 be paid by the defendant, and costs of the action”). The Ninth Circuit allows the  
 21 Court to employ the lodestar method for calculating attorneys’ fees where the  
 22 defendant agrees to pay attorneys’ fees separately from the class’ relief and not  
 23 from a common fund. *See Fleury v. Richemont N. Am. Inc.*, No. C-05-4525 EMC,  
 24 2008 WL 3287154, at \*3 (N.D. Cal. Aug. 6, 2008). Alternatively, or as a cross-  
 25 check, the Court may use percentage-of-recovery method. *See e.g. Selk v. Pioneers*  
 26 *Memorial Healthcare Dist*, 159 F. Supp. 3d 1164 (2016) (evaluating FLSA  
 27 settlement using percentage-of-recovery method). Under the settlement, Bask  
 28 agrees to pay Ferreri’s counsel, subject to Court approval, \$9,500 in fees and



1 \$1,352.82 in costs. (Martin Decl., Ex. A, ¶ 2(B)). A fee award is warranted here  
 2 because Ferreri's counsel obtained an excellent result for the FLSA members that  
 3 chose to participate in the case. The parties negotiated a fair settlement and only  
 4 discussed the fees after resolving the compensation to be paid to the collective  
 5 members. (Martin Decl., ¶¶ 6-10). The requested fees are far less than Ferreri's  
 6 counsel's lodestar and represents less than 25% of the total funds to be paid under  
 7 the proposed FLSA settlement. (Martin Decl., ¶¶ 22-28).

## 8 **VI. REQUESTED COSTS ARE REASONABLE**

9 Under the proposed settlement, Counsel seeks to recover costs associate with  
 10 prosecuting the collective members claims. The costs total \$1,352.82 and cover  
 11 filing fees, service fees, research fees, mailing costs, and copying costs. (Martin  
 12 Decl., ¶ 29). The costs are reasonable and necessary and are of the sorts that are  
 13 typically billed to paying clients in the marketplace. The Ninth Circuit allows  
 14 recovery of pre-settlement litigation costs in the context of class action settlements.  
 15 *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *see also* 4 Newberg &  
 16 Conte, Newberg on Class Actions §12.08, at 50-51 (2d ed. 1993). "Attorneys may  
 17 recover their reasonable expenses that would typically be billed to paying clients in  
 18 non-contingency matters." *In re Omnivision*, 559 F.Supp.2d 1036, 1048 (N.D. Cal.  
 19 2008); *see also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

## 20 **VII. CONCLUSION**

21 The parties respectfully request that the Court (1) approve the settlement  
 22 under the FLSA; (2) dismiss this entire action with prejudice; and (3) retain  
 23 jurisdiction to enforce the settlement agreement by issuing an Order that explicitly  
 24 retains jurisdiction to enforce the agreement pursuant to *Kokkonen v. Guardian*  
 25 *Life Ins. Co. of America*, 511 U.S. 375, 381-82 (1994).

1  
2 DATED: December 19, 2016

HOLLAND & HEART

3 By: /s/ Bryan K. Benard

4 Bryan K. Benard  
5 Attorneys for Defendant  
BASK TECHNOLOGY, INC.ITOK LLC

6  
7 DATED: December 19, 2016

AMARTIN LAW

8 SAN DIEGO COUNTY LAW OFFICES

9 By: /s/ Alisa A. Martin

10 Alisa A. Martin  
11 Attorney for Plaintiff  
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